

**IN THE UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF VIRGINIA  
Alexandria Division**

**JUSTIN E. FAIRFAX,**

**Plaintiff,**

**v.**

**CBS CORPORATION and CBS  
BROADCASTING INC.,**

**Defendants.**

Case No. 1:19-cv-01176

**DEFENDANTS' MOTION TO DISMISS**

Pursuant to Federal Rule of Civil Procedure 12(b)(6), Local Civil Rule 7, and Va. Code § 8.01-223.2, Defendants CBS Corporation and CBS Broadcasting Inc. (collectively, "CBS"), by and through undersigned counsel, hereby move this Court for an order dismissing this action with prejudice. As grounds for their motion, Defendants state as follows:

1. This action arises out of CBS's broadcasts of interviews with two women who accuse Plaintiff, the sitting lieutenant governor of Virginia, of sexual assault in incidents that occurred in 2004 and 2000. The Amended Complaint purports to state causes of action for defamation (Count One) and intentional infliction of emotional distress (Count Two).

2. CBS seeks dismissal with prejudice under Rule 12(b)(6) for failure to state a claim. Fairfax cannot state a claim because:

- a. The challenged broadcasts would not be understood by reasonable viewers to be an assertion by CBS that Fairfax is guilty of the alleged assaults;
- b. Fairfax has not plausibly pleaded facts that suggest CBS broadcast the interviews with the requisite level of fault: constitutional "actual malice," *i.e.*,

knowledge of falsity or having a high degree of awareness of probable falsity.

Many of the allegations Fairfax pleads to support his allegation of actual malice are conclusory statements the Court may ignore, and the few facts he does plead do not plausibly suggest actual malice on the part of the CBS employees responsible for the broadcasts;

- c. Regarding the intentional infliction of emotional distress claim, Fairfax has failed to overcome the First Amendment protections for speech about public officials and has not plausibly pleaded he suffered severe emotional distress or that CBS's actions were extreme and outrageous.

3. CBS also seeks dismissal with prejudice of the defamation claim pursuant to Va. Code. § 8.01-223.2, which provides immunity from suit premised on speech regarding a matter of public concern that is made without actual malice.

4. CBS Corporation also seeks dismissal with prejudice of the claims against it because Fairfax has not pleaded and cannot show any facts that would indicate, first, that CBS Corporation is liable for the content of the broadcasts at issue, and second, that CBS Corporation acted with actual malice.

WHEREFORE, and for the reasons set forth more fully in the accompanying Memorandum of Points and Authorities, CBS respectfully requests that the Court grant this Motion and enter an Order dismissing this action with prejudice.

#### **MEET AND CONFER CERTIFICATION**

Pursuant to Local Civil Rule 7(E), Defendants certify that counsel for CBS consulted with counsel for Plaintiff on October 31, 2019. Counsel for Plaintiff advised that Plaintiff was unwilling to withdraw the Amended Complaint or any of its claims.

Dated: November 1, 2019

/s/ Matthew E. Kelley  
Matthew E. Kelley, Va. Bar No. 84045  
Jay Ward Brown, Va. Bar No. 34355  
Ballard Spahr LLP  
1909 K Street NW, 12th Floor  
Washington, DC 20006  
Tel: (202) 508-1112  
Fax: (202) 661-2299  
kelley@ballardspahr.com  
brownjay@ballardspahr.com

*Counsel for Defendants CBS Corporation  
and CBS Broadcasting Inc.*

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 1st of November, 2019, I caused a copy of the foregoing to be filed electronically with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing to all interested parties.

/s/ Matthew E. Kelley

Matthew E. Kelley, Va. Bar No. 84045

Ballard Spahr LLP

1909 K Street NW, 12th Floor

Washington, DC 20006

Tel: (202) 508-1112

Fax: (202) 661-2299

kelley@ballardspahr.com

*Counsel for Defendants CBS Corporation  
and CBS Broadcasting Inc.*